

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS J. BUDZYNSKI,

Plaintiff-Appellant,

v

EDWARD J. GROSS and MODERN ELECTRIC,
INC.,

Defendants/Third-Party Plaintiffs-
Appellees,

and

ENG CONSTRUCTION, INC.,

Defendant-Appellee,

and

NOWAK & FRAUS, PLLC,

Third-Party Defendant.

THOMAS J. BUDZYNSKI,

Plaintiff-Appellant,

v

EDWARD J. GROSS and MODERN ELECTRIC,
INC.,

Defendants/Third-Party Plaintiffs-
Appellees,

and

ENG CONSTRUCTION, INC.,

UNPUBLISHED

March 18, 2003

No. 237330

Macomb Circuit Court

LC No. 97-004905-CZ

No. 239230

Macomb Circuit Court

LC No. 97-004905-CZ

Defendant-Appellee,

and

NOWAK & FRAUS, PLLC,

Third-Party Defendant.

Before: Meter, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

In Docket No. 237330, plaintiff appeals as of right from a judgment entered in favor of plaintiff, but raises issues in connection with the trial court's prior order granting defendants' motion for partial summary disposition regarding the issue whether plaintiff was entitled to treble damages pursuant to MCL 600.2919. In Docket No. 239230, plaintiff appeals as of right from the trial court's order awarding defendants case evaluation sanctions in the amount of \$17,000. We affirm in part and reverse in part.

Plaintiff first contends that the trial court erred in granting defendants' motion for partial summary disposition on the issue whether plaintiff was entitled to treble damages pursuant to MCL 600.2919. We disagree.

"Because the trial court looked beyond the pleadings in deciding defendant[s'] motion, we review the motion under MCR 2.116(C)(10)." *Trepanier v National Amusements, Inc*, 250 Mich App 578, 583; 649 NW2d 754 (2002). "A trial court's grant or denial of summary disposition under MCR 2.116(C)(10) is reviewed de novo on appeal." *Liberty Mutual Ins Co v Michigan Catastrophic Claims Ass'n*, 248 Mich App 35, 40; 638 NW2d 155 (2001). "A motion for summary disposition tests whether there is factual support for a claim." *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 720; 635 NW2d 52 (2001). "Affidavits, pleadings, depositions, admissions, and documentary evidence are considered in reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), and the evidence is viewed 'in the light most favorable to the party opposing the motion.'" *Id.*, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." *Universal Underwriters, supra* at 720.

In the instant case, plaintiff alleged in his complaint that defendants were liable for treble damages pursuant to MCL 600.2919 for trespassing upon plaintiff's property and cutting down plaintiff's trees, underwood, plants, and grasses without authority. MCL 600.2919 provides, in relevant part:

(1) Any person who:

(a) cuts down or carries off any wood, underwood, trees, or timber or despoils or injures any trees on another's lands, or

(b) digs up or carries away stone, ore, gravel, clay, sand, turf, or mould or any root, fruit, or plant from another's lands, or

(c) cuts down or carries away any grass, hay, or any kind of grain from another's lands without the permission of the owner of the lands, or on the lands or commons of any city, township, village, or other public corporation without license to do so, is liable to the owner of the land or the public corporation for 3 times the amount of actual damages. If upon the trial of an action under this provision or any other action for trespass on lands it appears that the trespass was casual and involuntary, or that the defendant had probable cause to believe that the land on which the trespass was committed was his own, or that the wood, trees, or timber taken were taken for the purpose of making or repairing any public road or bridge judgment shall be given for the amount of single damages only.

The damages provided for by the statute are punitive in nature and are not designed to be imposed in the absence of active misconduct. *Stevens v Creek*, 121 Mich App 503, 509; 328 NW2d 672 (1982). The burden is on the plaintiff to prove that the cutting was done without permission of the owner. *Id.* "In order to avoid treble damages, the defendant has the burden of proving that the trespass was casual and involuntary rather than wilful [sic]." *Id.* Further, "[t]reble damages under MCL 600.2919 . . . may not . . . be awarded where the trespass was merely negligent." *Iacobelli Construction Co, Inc v The Western Casualty & Surety Co*, 130 Mich App 255, 262; 343 NW2d 517 (1983). A trespasser's good faith and honest belief that he possessed the legal authority to commit the complained-of act is sufficient to avoid treble damage liability. *Governale v Owosso*, 59 Mich App 756, 759; 229 NW2d 918 (1975).

We conclude that there was no genuine issue of material fact regarding whether defendants had probable cause to believe the lands upon which they trespassed were their own. Defendants had the boundary line staked by two Nowak & Fraus ("Nowak") representatives. John Fekett, a crew chief at Nowak, staked the property in accordance with a boundary survey and coordinate printout in connection with irons previously set by Nowak. Edward Gross indicated that it was necessary to have the property professionally surveyed because plaintiff refused to listen to him regarding the matter. Plaintiff contended that he provided an aerial photograph to defendants in order to demonstrate where the boundary line between the parcels was located, but conceded that the aerial photograph did not depict the legal boundary line and that the photograph was actually inaccurate itself. Defendants then had another survey performed by Gary Swen, another crew chief at Nowak, which, in fact, revealed that the original boundary was incorrect, based on the iron stakes set by Nowak. Defendants' good faith and honest belief that defendants possessed the legal authority to enter upon the land and to engage in the clearing of the property is sufficient to avoid treble damage liability. Resolving all reasonable inferences in favor of plaintiff, we find that there is no genuine issue of material fact regarding the issue of treble damages, and the trial court properly granted defendants' motion for partial summary disposition.

Next, plaintiff argues that the trial court erroneously granted defendants' motion for case evaluation sanctions pursuant to MCR 2.403(O). We agree. We "review the court's decision whether to grant mediation¹ sanctions de novo because it involves a question of law, not a discretionary matter." *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 129; 573 NW2d 61 (1997) (footnote added).

Plaintiff contends that the trial court erroneously granted defendants case evaluation sanctions because the adjusted verdict is more than ten percent greater than the case evaluation award. It is uncontested that plaintiff needed to obtain an adjusted verdict of \$82,500 in order to avoid case evaluation sanctions.

This issue involves the interpretation of MCR 2.403(O)(3), which provides:

For the purpose of subrule (O)(1), a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the case evaluation, and, if applicable, by making the adjustment of future damages as provided by MCL 600.6306 After this adjustment, the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation. If the evaluation was zero, a verdict finding that a defendant is not liable to the plaintiff shall be deemed more favorable to the defendant.

"[I]n determining the propriety of sanctions pursuant to MCR 2.403(O)(3), if a party has rejected a mediation award and the case proceeds to trial, the verdict must be adjusted by adding to it 'assessable costs,' not 'actual costs,' incurred from the filing of the action to the date of the mediation evaluation, as well as interest for the same period." *Dessart v Burak*, 252 Mich App 490, 499; 652 NW2d 669 (2002). "MCR 2.403(O)(3) does not expressly or impliedly allow for the inclusion of postmediation costs or any attorney fees, for reasons that are well founded." *Id.* at 498. If postmediation litigation costs and attorney fees were included in the amount of the adjusted verdict, "the risk of going to trial would be minimized, thereby undermining the court rule's purpose of discouraging litigation." *Id.*

Plaintiff asserts that if assessable costs include only those costs that were incurred before the date of case evaluation, he still meets the adjusted-verdict amount because the cost of the analyses and reports, which plaintiff asserts were performed in advance of the case evaluation date, along with the jury verdict and interest, exceed the necessary threshold amount of \$82,500. We agree.

The trial court awarded plaintiff taxable costs at the close of trial, including expert fees and expenses incurred to obtain analyses and reports. Plaintiff provided evidence that such fees were incurred before the case evaluation. Defendants do not contend that such costs were improperly awarded in the judgment, but merely contend that such costs should not be included in determining the "assessable costs" under MCR 2.403(O). However, because such costs were

¹ We note that the process previously referred to as mediation was changed to "case evaluation" in 2000. *Barouth v Hammoud*, 465 Mich 375, 376 n 1; 632 NW2d 496 (2001).

apparently incurred before the date of the case evaluation, the costs should have been included as assessable costs for the purpose of MCR 2.403(O). See *Dessart, supra* at 499. Utilizing defendants' calculated interest amount (\$7,964.83) and the jury verdict (\$73,693.76), the adjusted verdict, including the \$5,938.50 in analyses and report fees, exceeds the threshold amount necessary for plaintiff to avoid case evaluation sanctions. Thus, we conclude that the trial court erred in awarding defendants case evaluation sanctions.

Affirmed in part and reversed in part.

/s/ Patrick M. Meter
/s/ Kathleen Jansen
/s/ Michael J. Talbot